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Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1980

No. A-781

LOUIS BECK,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals

for the Seventh Circuit

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CASES CITED

Alford v. United States, 282 U.S. 687 (1931).

Barber v. Page, 390 U.S. 129 (1968).

Brookhart v. Janis, 384 U.S. 1 (1966).

California v. Imbler, 400 U.S. 865 (1970).

Davis v. Alaska, 415 U.S. 308

Giglio v. United States, 405 U.S. 105 (1971).

Greene v. McElroy, 360 U.S. 474 (1959).

Hamric v. Bailey, 386 F. 2d 390 (4th. Cir. 1967).

Imbler v. Craven, 298 F. Supp. 795 (C.D. Ca. 1969).

Kirby v. United States, 174 U.S. 47 (1899).

Maddox v. United States, 156 U.S. 237 (1895).

McConnell v. United States, 393 F. 2d 404 (5th. Cir. 1968).

Napue v. Illinois, 360 U.S. 264 (1959).

Smith v. Illinois, 390 U.S. 129 (1968).

Turner v. Ward, 321 F. 2d 918
(10th. Cir. 1963).

United States v. Bohle, 445 F. 2d 54
(7th. Cir. 1971).

United States v. Harris, 498 F. 2d 1164
(3rd. Cir. 1974).

United States v. Young, 419 U.S. 1069
(1974).

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Seventh Circuit

LOUIS BECK, your petitioner, respectfully prays that a Writ of Certiorari be issued to review the Judgment of the United States Court

of Appeals for the Seventh Circuit entered in the above entitled cause on January 2, 1980.

JURISDICTION

The Judgment of the United States Court of Appeals for the Seventh Circuit was entered on January 2, 1980. The Court of Appeals denied appellant's Motion for Rehearing and Rehearing en banc on February 8, 1980.

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED FOR REVIEW

1. Was the defendant deprived of his Sixth Amendment rights when the trial judge required defendant's counsel to conduct cross-examination of witnesses outside the presence of the jury prior to conducting the cross-examination in the jury's presence.

II. Was the Due Process Clause of the Fifth Amendment violated when the prosecutor allowed testimony to be presented

at trial that created a false impression of facts known not to be true.

STATEMENT OF THE CASE

On July 24, 1978, the defendant, Louis Beck, and Diversified Realty Investment Corporation, proceeded to trial in the United States District Court, Eastern District of Wisconsin, before the Honorable Robert W. Warren and a jury of twelve. The prosecution was by way of Indictment for violation of Title 18, §1341 and §2, the Mail Fraud Statute. The eleven count Indictment charged a scheme to defraud through the sale of parcels of land in Cochran County, Texas.

On August 11, 1978, the jury returned a verdict of guilty on each count. On August 21, 1978, the defendant filed his Motion for New Trial or in the Alternative to Enter Judgment of Acquittal and same was

overruled on November 28, 1978.

On November 28, 1978, the defendant timely filed his Notice of Appeal to the United States Court of Appeals for the Seventh Circuit. On January 2, 1980, the Court of Appeals affirmed the conviction.

In the trial below, the district judge's actions at a very early point in the trial severely hampered the defendant and denied him a fair trial. During the cross examination of the third Government witness, the assistant United States Attorney requested that the judge stop the defense counsel from questioning the Government witness regarding any prior testimony the witness may have given. The United States Attorney argued that if counsel desired to cross-examine the witness regarding any prior testimony that he might have given, that he do so outside the presence of the jury.

At this point, the Court engaged in the following dialogue outside the presence

of the jury:

"The Court: I think that one it is, I think there is enough danger of prejudicial inference arising so that to let the defense counsel ask a whole series of witnesses that question in front of a jury is something that I ought not to permit unless there is some reasonable belief that there has been some testimony elsewhere that we are not aware of, that being the case, I would instruct counsel that if he wishes to ask that question it should be asked outside the presence of the jury and we will give him an opportunity to do so.
Mr. Schwartz: (defense counsel) There is an additional question that I asked of the last witness and came in without objection and I have asked if they have ever testified anywhere else in this matter and I

would like to continue that course of examination. I don't know if they have testified to a Regulatory Land Commission, I don't know if they have testified anywhere else, they might have given statements to a newspaper reporter that I would probably be entitled to get subject to putting the reporter in jail for failure to turn them over but,

THE COURT: I see the same problem there, I think if you are going to ask the question why you can't ask them both at the same time.

MR. SCHWARTZ: But, Judge, I don't know why I would be prohibited from asking that in front of the jury. This is part of the trial, and I think this is part of the right to an open, public trial and I think by you requiring me to ask that in a chamber proceeding outside . . .

THE COURT: Are you talking about the

second question?

MR. SCHWARTZ: The second question, I think is a legitimate cross-examination.

THE COURT: Have you ever testified?

MR. SCHWARTZ: In any other matter.

THE COURT: On this subject?

MR. SCHWARTZ: On this subject and I think I'm entitled to this, if the Court instructs me not to do it, I think you have unduly restricted my right of cross-examination.

MR. KRAVIT: (U.S. Attorney) But, your Honor, if the question is asked outside the presence of the jury and there is any indication whatsoever that there is such testimony, then we don't have any objection to putting it in front of the jury, same question, same answer, but if the answer is no, then the only inference, the only inference (sic) can possibly be is that there is something wrong with the way these proceedings were

put together.

THE COURT: I'm going to adhere to my position, Mr. Schwartz. In the future, that may mean that you go down and talk to the gentlemen in Chicago.

MR. SCHWARTZ: It might well be. Okay your Honor. Just to be perfectly clear now on your instruction, is it your position that I cannot cross-examine the witness as to whether or not he testified to any other proceeding concerning this matter in the presence of the jury?

THE COURT: Uh huh.

MR. SCHWARTZ: Okay. At this time, your Honor, I would like to be continuing that I would like to move for mistrial on the grounds that you are unduly restricting my Constitutional right of cross-examination in the presence of the jury. I don't think I can be compelled to a star chamber proceeding out of the presence of the jury on a

matter that is extremely relevant at this time. I move for mistrial . . . ."

From that point forward, the trial judge did not allow defense counsel to cross-examine prosecution witnesses regarding any prior testimony they might have given in any forum.

Later in the trial, a key prosecution witness testified. Upon cross-examination the witness was asked the following questions by defense counsel in an attempt to expose his motives for testifying:

Q. As a matter of fact, you were asking for immunity in an indictment you had in Florida, were you not?

A. What was that, Sir?

Q. You were asking for immunity in an Indictment you already had in Florida?

A. I was not indicted in Florida, Sir.

Q. You were not?

A. No, sir.

Q. Did you work for the

Equitable Development Company?

A. I did.

Q. You were not a party to that?

A. I was not indicted.

Q. Well, then, is that part of the immunity you were talking about?

A. No, sir, the Equitable Development case was the Company that I previously worked for that went bankrupt but no Indictment was issued against me.

Several days after the prosecution witness, Mr. Green, had so testified, counsel for defendant obtained and produced a sixty-four Count Information filed against Mr. Green in a Florida State Court. During the period of cross-examination of Mr. Green, wherein he indicated that he had not been indicted, John Halberg, the investigating postal inspector in the case was present at the prosecution table and heard Mr. Green testify. Neither the postal inspector, Halberg, nor the Assistant U.S. Attorney

made any effort at that point to correct the testimony of Mr. Green which they knew at the time gave the jury a false impression, for they knew that Mr. Green had a sixty-four count Information pending against him.

Defense counsel at this point moved for a mistrial and same was denied. The trial then proceeded as aforesaid with the resulting jury verdict.

ARGUMENT

The following discussion will amplify the reasons why this Court should review on Writ of Certiorari the decision of the courts below. The issues involved herein concerned the application of the Fifth and Sixth Amendments to the United States Constitution and their effect on the rights of the defendant at trial.

The decision below is in conflict with an earlier decision of the same circuit and

conflicts in other regards to the decisions in various circuits throughout this country. These issues are of special importance to the trial bar at large for they concern the extent to which the trial court is permitted to suppress the rights of the defendant as guaranteed by the United States Constitution.

It should be noted that the court below's reasoning and result is in direct conflict with cases emanating out of this Court concerning the same subject matter and this will be set forth herein.

I.

In the early case of Kirby v. United States, 174 U.S. 47, (1899), the Supreme Court described the Sixth Amendment right of confrontation as:

> "One of the fundamental guarantees of life and liberty, and a right long being so essential for the due protection of life and liberty that it is guarded against Legislative and Judicial action by provisions in the United States Constitution and in the constitutions of most if not all of the states composing the Union."

In Greene v. McElroy, 360 U.S. 474 (1959), this Court stated that the confrontation clause and the right of cross examination:

> "have ancient roots . . . . This court has been zealous to protect these rights from erosion. . ."

Faced with the solid and lasting precedents, it is inconceivable how this Court can let stand the actions of the district court in denying an accused his basic right to cross examine and confront the witnesses against him. In essence what is occurring herein is the judicial erosion of the Constitutional guarantees as set forth and defined by the decisions of this court.

In the instant case, counsel for defendant was attempting to elicit facts peculiarly within the knowledge of the witnesses, but he was cut off at the threshold by the Judge. The judge stated that unless counsel for

defendants could provide the Court in advance with what he expected the witness to say, he would not allow said questions to be asked.

This requirement imposed by the trial judge was not supported by the law and only had the effect of further denying the defendants their Sixth Amendment right of cross-examination. The case of Alford v. United States, 282 U.S. 687 (1931) provides the foundation for this area of the law, wherein it is stated:

> "Counsel often cannot know in advance what pertinent facts may be elicited in cross-examination. For that reason it is necessarily exploratory."

For the trial court below to forbid the most rudimentary questioning and halt the defendant's inquiry at the threshold, effectively emasculated the defendant's right of cross-examination. The trial court in preventing defense counsel from

questioning the witnesses about any prior testimony in the matter prevented counsel from exposing to the jury facts from which they as triers of fact and credibility could draw inferences relating to the reliability of the witnesses and such action amounted to an abuse of discretion and prejudicial error. It is apparent that the prejudice to the defendant by the trial court's action was magnified in this case due to the nature of the testimony used by the Government. As often stated by this Court,

> "Certain principles have remained relatively immutable in our jurisprudence . . . the evidence used to prove the Government's case must be disclosed to the individuals so that he has an opportunity to show that it is untrue. While this is important in the case of documentary evidence, it is even more important where the evidence consists of the testimony of individuals whose memory might be faulty

> or who, in fact, might be perjurers or persons motivated by malice, vindictiveness, intolerance, prejudice or jealousy. We have formalized these protections in the requirements of confrontation and cross-examination . . . ."

Greene v. McElroy, 360 U.S. 474 (1959). As a result of the trial court's actions in foreclosing defense counsel from cross-examining the witness, the defendant was not permitted this safeguard and was in essence denied a fair trial.

Another Constitutional protective feature of cross-examination that was denied the defendant was the opportunity to reveal possible biases, prejudices or ulterior motives of the witnesses as they may relate to a state of mind of the witnesses at some former time. Questions by defense counsel seeking to elicit information and facts concerning any prior testimony could have been a significant tool in the hands of skilled defense counsel. This "tool" is provided

by the Sixth Amendment to the United States Constitution. For the trial judge to remove such a tool from counsel's arsenal was "Constitutional error of the first magnitude and no amount of showing of want of prejudice would cure it". Davis v. Alaska, 415 U.S. 308 318; Brookhart v.Janis, 384 U.S. 1, 3 (1966).

This court has held on many occasions that:

> "It is the essence of a fair trial that reasonable latitude be given the cross-examiner . . . ."

Smith v. Illinois, 390 U.S. 129 (1968). In the instant case, the Court's actions were unreasonable and the Constitutional error was magnified when the Court not only prohibited the counsel for the defendant from cross-examining the jurors

but went further in seeking to force the defendant to waive his right to a public trial by conducting the trial behind closed doors.

The trial court stripped the defendant of his Constitutional right of confrontation as guaranteed by the Sixth Amendment of the United States Constitution when he required that the defense counsel conduct a "dress rehearsal" of cross-examination outside the presence of the jury. Such a practice has not been approved by this Court and in fact, this Court has recently stated that the right of an accused in a criminal prosecution to be confronted with the witnesses against him means more than being allowed to confront the witnesses physically.

Davis v. Alaska, 415 U.S. 308 (1974).

The confrontation clause not only provides for the cross-examination of witnesses but also provides for,

> "Personal examination and cross-examination of the witness in which the accused has an opportunity not only of testing the recollection and sifting of the conscience of the witness, but of compelling him to stand face to face with the jury in order that they may look at him and judge by his demeanor upon the stand and the manner in which he gives testimony whether he is worthy of belief."

Barber v. Page, 390 U.S. 719 (1968); Maddox v. United States, 156 U.S. 237 (1895).

In the instant case, counsel for the defendant sought to ask the witness upon cross-examination whether or not they had ever testified anywhere else in this matter. The United States Attorney requested that the Judge order

these questions to be answered outside the presence of the jury and suggested that counsel for defendant ask the question first outside the presence of the jury and if a favorable response was obtained, then to bring the jury back into the courtroom and ask the question of the witness once again.

The trial judge was swayed by the Government's erroneous and illogical argument and ordered counsel for defendants to ask the questions solely outside the presence of the jury. It is clear that by requiring cross-examination of Government witnesses outside the presence of the jury, the defendant was denied the essence of a fair trial. Alford, supra, at 692. Additionally, it is of particular relevance that the questions sought to

be asked by defendant's counsel concerned "prior testimony" that might have been given by the Government witness. Not allowing this line of questioning flies in the face of the well established rule that:

> "In criminal cases, great latitude is generally permitted in the cross-examination of a prosecution witness in order to test his credibility. Especially as to any prior inconsistent statement which could be used in an effort to impeach him".

United States v. Bohle, 445 F. 2d 54 (7th. Cir. 1971); McConnell v. United States, 393 F. 2d 404 (5th. Cir. 1968). In the instant case, the only way for counsel to learn of prior statements was to ask the witnesses if any were made and in the instant case, the defendant was denied that right. In Bohle, as in the instant case, the trial judge ordered that defense counsel cross-examine a

prosecution witness outside the presence of the jury about a prior statement she made. Bohle, supra, at 74. Upon appeal, the Seventh Circuit held that the trial judge in ordering defense counsel to conduct his cross-examination outside the presence of the jury denied the defendant his fundamental right of cross-examination and confrontation. The Court therefore granted a new trial to the defendant. Bohle, supra, at 75.

In the instant case, as in Bohle, the trial judge attempted to force the defendant to conduct his cross-examination of prosecution witnesses outside of the presence of the jury despite the defendant's Constitutional right to have the trial conducted before the jury. The Seventh Circuit in Bohle, in condemning the procedure whereby witnesses were

questioned first outside the presence of the jury and then brought before the jury stated:

> "The witness was permitted time by the voir dire procedure to consider her answer and to eliminate any reaction of surprise to the alleged impeaching material out of the presence of the jury. Such a practice would appear to have a strong tendency to undermine the function of confronting the witness with the question in the first place. The loss to the jury of the witness's initial and immediate response is accompanied by the loss of one potentially significant aspect of the credibility determination."

Bohle, supra, at 75.

The rationale of the Bohle case, is sound and vital to our system of jurisprudence. In the instant case, the Seventh Circuit ignored the holding in Bohle and allowed the very same procedure which they had at an earlier point condemned to establish itself as

precedent in the federal courts of this country. Under these circumstances, it is crucial that this court review the matter and determine that such a procedure abrogates the defendant's Constitutional rights to such a degree that it should not be permitted.

II

On Thursday, August 3, 1978, the Government called Lester Green to the stand to testify on behalf of the Government. After testifying on direct examination, he was asked questions on cross-examination by counsel for the defendant regarding his motivation for testifying. (See Statement of Case) On Monday, August 7, 1978, counsel for the defendant moved for a mistrial. The basis for the Motion for Mistrial was that subsequent to Mr. Green's testimony

and after he had been dismissed as a witness and left the State, counsel obtained a verified and certified copy of a sixty-four count Information filed against Mr. Green.

The importance of the certified Information is clear for it reveals that Lester Green was not honestly answering the questions submitted to him on cross-examination. The Government took the position that the statement in question may have been misleading but that it was literally true. In essence, the Government has admitted that the testimony was misleading and would therefore create a false impression. Under these circumstances, many circuits have ruled that the defendant's due process rights under the Fifth Amendment were violated by the use of such evidence. Imbler v. Craven, 298 F. Supp. 795 (C.D. Ca. 1969), aff'd. 424 F. 2d 631 (9th. Cir.

1969), cert. den. sub nom., California v. Imbler, 400 U.S. 865 (1970); Turner v. Ward, 321 F. 2d 918, 920-921 (10th. Cir. 1963); Hamric v. Bailey, 386 F. 2d 390, 394 (4th. Cir. 1967); United States v. Harris, 498 F. 2d 1164, 1168-9 (3rd. Cir. 1974), Cert. den. sub nom. United States v. Young, 419 U.S. 1069 (1974).

These cases are all in line with this Court's decisions interpreting the Due Process Clause of the Fifth Amendment. Giglio v. United States, 405 U.S. 105, 153-4 (1971); Napue v. Illinois, 360 U.S. 264 (1959).

In the instant case, the Seventh Circuit determined that Mr. Green's testimony was "literally true" therefore they were not compelled to determine the effect of the testimony. In essence though, they have conceded that Mr. Green's testimony was "misleading". Under these circumstances,

it is clear that the Fifth Amendment would not tolerate the use of literally true testimony which in effect is as misleading and false as would be an absolute lie. The cases construing the Fifth Amendment's constraint on the Government's use of false evidence to obtain convictions concern themselves with the fact that under our system of justice, a trial must be conducted so as to be a "fair trial". In Napue, this Court held that:

> "A lie is a lie no matter what its subject, and if it is in any way relevant to the case, the district attorney has a responsibility and a duty to correct what he knows to be false and elicit the truth . . . that the district attorney's silence was not the result of guile or a desire to prejudice, matters little, for its impact was the same, preventing, as it did, a trial that could in any real sense be termed fair."

Napue, supra, at 70.

In the instant case, the Seventh Circuit is in effect ignoring the dictates

of the Fifth Amendment when they declare that they will permit literally true but misleading evidence to be used to obtain convictions in the federal district courts. Under these circumstances, the courts are playing semantic games with the heretofore solid principles established by this Court. The effect of using evidence that is misleading and evidence which creates false impressions before the Jury is the same as permitting evidence which is patently false on its face. The effect is that the jury is misled by the acts of the Government and such behavior has not and should not be tolerated in this court system.

CONCLUSION

Based upon the discussion herein and the authorities cited, it is incumbent upon this Court to grant Certiorari to

review this case and its ramifications upon the Federal Courts.

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APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

Chicago, Illinois 60604

Argued: October 25, 1979

January 2, 1980

Before

Hon. Robert A. Sprecher, Circuit Judge

Hon. Francis L. Van Dusen, Senior Circuit Judge

Hon. Richard D. Cudahy, Circuit Judge

UNITED STATES OF AMERICA, Plaintiff-Appellee,	)	Appeal from the United States District Court for the Eastern District of Wisconsin. No. 78 CR 19 Hon Robert W. Warren
No. 78-2513 vs.	)	
LOUIS BECK and DIVERSIFIED REALTY INVESTMENT CORPORATION, Defendants-Appellants.	)	

ORDER

Appellants Louis Beck and Diversified Realty Investment Corporation (the "company") were convicted of eleven counts of mail fraud under 18 U.S.C. §1341 and §2. Louis Beck

owned the Company and was its President. The indictment alleged a mail fraud scheme involving sales and attempted sales of parcels of undeveloped land in Cochran County, Texas. Essentially the scheme described in the indictment concerned the purchase of 1,500 acres of undeveloped land at $60.00 per acre for a total of $90,000 and its subsequent offering for sale at $1,145 per acre, or $5,725 for a five acre parcel. Sales of land in question were promoted by the sending of sales materials through the mails to prospective purchasers in various parts of the United States. Further, telephone land salesmen were used to make calls to potential purchasers, including prospects in Wisconsin. The undeveloped Texas land was ultimately promoted in five-acre parcels as "Tierra del Oro Estates -- The Golden Land." Had all 278 five-acre parcels of undeveloped land which were available been sold, gross receipts from

from sales of the land would have approached two million dollars. In the event, 96 parcels were actually sold.

One of the potential Wisconsin customers reached by appellants' scheme was Dennis Crull, a resident of Brookfield, Wisconsin, who taped telephone conversations he engaged in with a land salesman, who called from Florida. The tapes of those conversations were played to the jury. While sales and solicitations of sales were in progress, the Better Business Bureau in Lubbock, Texas, received inquiries concerning the sale of undeveloped Texas land and recorded on tape a telephone conversation with appellant Beck. There was testimony that Beck, in addition to supervising all sales of the land in question, made some sales and some telephone representations himself.

Appellants halted sales of the Texas land when they became aware of unfavorable

publicity in the Milwaukee, Wisconsin, area and of the fact that a grand jury subpoena had been served at appellants' bank in Miami, Florida, in late November, 1977. Not long thereafter certain principal investors in the project, as well as some customers, became aware of the questionable character of the land offered for sale.

There was evidence of misrepresentations made, or caused to be made, by or with the knowledge of, appellants in five areas: mineral interests in the property; interest by oil companies in purchasing the property; agricultural capability of the properties; equity or enhanced value over cost inhering in the property as a result of its alleged acquisition through repossession or as a result of a divorce of relating to forfeiture; and misleading information as to the distances involved and as to the location of the property and of the developer.

In general, the alleged scheme to defraud through sale of relatively cheap, undeveloped land at highly inflated prices through fraud and misrepresentation was a classic land swindle. Appellants have alleged eight errors by the District Court in the course of trial, all of which we find without merit, and we, therefore, affirm the judgments of conviction.

I.

Appellants argue that at trial they were deprived of their Sixth Amendment rights because the District Court did not allow appellants' attorney to ask most of the prosecution witnesses certain questions in the presence of the jury. These questions were: "Did you appear before the grand jury here in Milwaukee?" and "Have you ever testified in any other matter on this subject?"

The first witness for the government,

Dennis Crull, had testified before the grand jury but was not asked any questions about prior testimony. The government's next two witnesses, however, who had not testified before the grand jury, were asked about prior testimony, and the government objected to the questions when they were directed to the second of these two witnesses. Judge Warren permitted the questions to be asked and answered. In the case of the fourth government witness, however, the government's objection was sustained with the provision that the same questions could be put to the witness or to subsequent witnesses outside the presence of the jury and, if the witness indicated that he had testified, further cross-examination would be conducted in the presence of the jury. Appellants declined, in the absence of the jury, to ask questions with respect to possible prior testimony, and, instead, moved unsuccessfully for mistrial.

Appellants argue that they had a right to ask the questions in issue since they did not know whether the witnesses had made statements in prior proceedings which might be used to impeach their present testimony. They also argue that they are being denied the opportunity to test the credibility of government witnesses and to reveal possible prejudice or ulterior motives of the witnesses as they may relate to a state of mind of the witnesses at some former time. Appellants contend that, by excluding from the jury the cross-examination with respect to the existence of prior testimony, Judge Warren deprived them of the opportunity of showing the jurors the demeanor of witnesses in unrehearsed responses to the questions since the witnesses might have been surprised by such questions or by their implications and might have reacted spontaneously in a way

which would go to their credibility.

The position of the government is that, through the liberal "open file" policy of the Eastern District of Wisconsin, appellants have had extensive access to any prior statements of the government witnesses. At oral argument the government represented that it had made all prior statements of all its witnesses available to appellants (including grand jury transcripts twenty-four hours before trial). The government objected to the asking of these two questions because only two of its twenty-six witnesses had testified before the grand jury and a long series of negative answers might suggest that there was something wrong with the indictment.

The government contends that evidence showing that very few of its witnesses had appeared before the grand jury was not relevant since appellant may not attack the

competency and adequacy of the evidence before the grand jury. The government further argues that all available witnesses need not be called before the grand jury. It is also argued that appellants were not deprived of their Sixth Amendment rights because, if affirmative answers to either of the questions in issue were received outside the presence of the jury, further cross-examination with regard to these prior statements for purposes of impeachment could have been carried on before the jury.

The extent and scope of cross-examination are within the sound discretion of the trial judge. Smith v. Illinois, 390 U.S. 129, 132 (1967). Rulings of the trial judge in this area "will not be disturbed in the absence of abuse of discretion." United States v. Isaacs, 493 F. 2d 1124, 1162 (7th. Cir. 1974), cert. denied sub nom., United States v. Kerner, 417 U.S. 976 (1974),

reh. den., 418 U.S. 955 (1974). (See also, Federal Rules of Evidence, 28 U.S.C. Rule 403 and Rule 611.) The trial judge may properly refuse to allow government witnesses to be asked questions on cross-examination which "would have presented an inference of a duty that we have found did not exist." United States v. Lehman, 468 F. 2d 93, 106 (7th. Cir. 1972), cert. denied, 409 U.S. 967 (1972). Cross-examination may also be restricted "where it is likely to be more prejudicial than probative . . . ." Hood v. United States, 365 F. 2d 949, 951-2 (D.C. Cir. 1969).

Judge Warren did not abuse his discretion to limit the scope and extent of cross-examination by requiring questions about the existence of prior testimony to be asked outside the presence of the jury. The trial judge certainly could have concluded that appellants' proposed line of questioning, by evoking a series of negative

answers from government witnesses, could have created the impression in the minds of the jurors that the indictment was infirm. Failure of witnesses to appear before the grand jury and the competency and adequacy of the evidence before the grand jury are not appropriate grounds for attacking the indictment. Costello v. United States, 350 U.S. 359, 363 (1956); United States v. Eucker, 532 F. 2d 249, 255-256, (2d Cir. 1976).

The appellants' Sixth Amendment right to confront and cross-examine the government's witnesses is an "essential and fundamental requirement" of a fair trial. Pointer v. Texas, 380 U.S. 400, 405 (1965). Some restrictions, however, not violative of the Sixth Amendment, may be imposed on the defendant's right to cross-examine witnesses. Thus this Court has held that although "great latitude is generally permitted in the cross-examination of a prosecution witness in order

to test his credibility," the defendant's interest in effective cross-examination must be balanced against the "interest in avoiding abuse of that right," which is typically protected by the exercise of the trial court's broad discretion in controlling cross-examination. United States v. Bohle, 445 F. 2d 54 74 (7th. Cir. 1971).

In the instant case, because appellants chose not to question these prosecution witnesses outside the presence of the jury about the existence of earlier testimony, we do not know whether these witnesses had testified in other proceedings or, if they had, whether such testimony varied from their present testimony. Thus, there is nothing to show that their initial responses to the question about any testimony in other proceedings would have helped the jury assess their credibility. Further, it was completely

unnecessary for appellants' counsel to ask the witnesses whether they had testified before the grand jury because that information was available before trial. There was, moreover, a legitimate concern that these questions would raise an improper inference in the minds of the jurors which could lead them to question the sufficiency of the indictment.

Under all the circumstances, the restriction imposed on the appellants did not violate their Sixth Amendment rights because the potentially probative value of the witnesses' initial responses was outweighed by the interest in avoiding an irrelevant and improper inference from the line of questioning. The risk that the jury might improperly infer that the indictment was affirm because most of the witnesses did not appear before the grand jury was real. And Judge Warren's rulings reflect an appropriate weighing of the probative value of

any evidence likely to be elicited against the danger of unfair prejudice or confusion of the issues or the misleading of the jury. See Federal Rules of Evidence, Rule 403.

In United States v. Bohle, supra, this Court held that it was improper to require that an important government witness be asked about prior inconsistent statements outside the presence of the jury. The lower court in Bohle had allowed questioning away from the jury because it feared that defense counsel would not follow up these foundation questions with extrinsic evidence of prior inconsistent statements. Since the foundation questions in Bohle were asked outside the presence of the jury, the jury was unable to see the witness' initial response. This Court applied the balancing test and concluded that the restriction violated the Sixth Amendment. In the instant case, however, the potential for abuse was greater, and the probative value of the

demeanor evidence was far less clear. We, therefore, reject the contentions of the appellants that the District Court's ruling violated appellants' Sixth Amendment rights.

II

Appellants also argue that Judge Warren failed to grant a mistrial based upon alleged false statements of a government witness known by the prosecutor or his agent to be false but not corrected by them at trial. The statements in question were those of government witness, Lester Green, who on cross-examination was asked certain questions by appellants' counsel allegedly reflecting his motives for testifying, as follows:

> "Q. And as a matter of fact, you were asking for immunity in an indictment you had in Florida, were you not?
>
> A. What was that, sir?
> Q. You were asking for immunity in an indictment you already had in Florida?
> A. I was not indicted in Florida, sir.

Q. You were not?
A. No, sir.
Q. Did you work for the Equitable Development Company?
A. I did.
Q. You were not a party to that?
A. I was not indicted.
Q. Well, then, is that part of the immunity you were talking about?
A. No, sir, the Equitable Development case was the Company that I previously worked for that went bankrupt, but no indictment was issued against me."

After Mr. Green had so testified, appellants obtained and produced a sixty-four count information filed against Green in a Florida state court.

Appellants allege that John Hollberg, the investigating postal inspector in the instant case, was siting in the court room at the time the testimony was given and that he knew Mr. Green's statement to be untrue. The alleged false testimony was given on a Thursday, but counsel for the appellants did not move for a mistrial until the following Monday. The government argues

that the statement in question may have been misleading but that it was literally true, even if non-responsive. Most significantly, further questions might have been asked by defense counsel which would have required witness Green to tell the whole truth. The government also argues that the record does not disclose whether postal inspector Hollberg was present inthe court room at the time the alleged false testimony was given.

A new trial would be required if the prosecutor knowingly presented false evidence which could reasonably have affected the judgment of the jury; the use of such evidence violates the due process clause of the Fifth Amendment. Giglio v. United States, 405 U.S. 105, 153-4 (1971). A defendant's right to due process would also be violated if the prosecutor failed to correct false evidence even though he had not solicited it and it was relevant only to the witness's credibility. Napue v.

Illinois, 360 U.S. 264, 269 (1959). In implementing this aspect of Fifth Amendment protection, this Court has noted that "perfection in this regard cannot always be realistically expected" and that therefore the "test to be applied in cases wherein prosecutorial misconduct is simply alleged is whether the accused was insured of andaccorded the genuine fairness to which he was entitled during the progress of the trial." United States v. Marrero, 516 F. 2d 12, 14-15 (7th. Cir. 1975), cert. denied, 423 U.S. 862 (1975).

In this case, the testimony of the government's witness was literally true though it was not essentially responsive to the questions. (Cf. Teague v. United States, 499 F. 2d 1381, 1385 (7th. Cir. 1974).) Appellants' counsel could have persisted in cross-examining the witness so that there would have been a full response to the

questions, but he failed to do so. Under these circumstances, the prosecutor's failure to clarify the record did not deprive the appellants of "genuine fairness" within the meaning of the Fifth Amendment because the testimony was not false and because the appellants' attorney could have clarified the record by effectively cross-examining the witness.

Several cases contain language to the effect that a prosecutor must correct testimony which is "substantially misleading" or "creates a false impression of facts known not to be true." Imbler v. Craven, 298 F. Supp. 795, 806 (C.D. Ca. 1969), aff'd. 424 F. 2d 631 (9th. Cir. 1969), cert. denied sub nom, California v. Imbler, 400 U.S. 865 (1970) Turner v. Ward, 321 F. 2d 918, 920-21 (10th. Cir. 1963); Hamric v. Bailey, 386 F. 2d 390, 394 (4th. Cir. 1967); United States v. Harris,

498 F. 2d 1164, 1168-9 (3rd. Cir. 1974), cert. denied sub nom., United States v. Young, 419 U.S. 1069 (1974). Each of these cases, however, may be distinguished from the instant case because none of them involves literally truthful but non-responsive testimony elicited during cross-examination which could have been clarified by further questioning. Rather, each of these cases involves testimony which was indisputably false and was therefore misleading. Even if the testimony in the instant case were considered misleading, it would be misleading only because appellants' counsel failed to make the witness respond fully to the question.

Thus, on the facts of this case, we do not perceive any clear duty of the government to step forward to clarify the record. Even assuming that inspector Hollberg was present (and we believe that such an assumption was

not wholly unreasonable), we do not believe that there is anything about this incident which would have required a mistrial.

III.

Further, we do not believe there was anything erroneous about the following question propounded by the government of appellant Beck:

> "Now, isn't it a fact that, Mr. Beck, that you at one time in 1977 threatened to lie regarding the sale of Tierra del Oro?"

When, after objection, Beck was permitted to answer the question before the jury his answer was as follows:

> "I believe I threatened to tell the truth under oath about the Tierra del Oro Estates."

Appellants argue that the question had the effect of implying that Beck was a liar, thereby prejudicing him in the eyes of the jury. Appellants further argue that no proper foundation was laid for the question.

In our opinion there was enough foundation incorporated in the question (as the answer suggests) to enable the witness to reply intelligently. See United States v. Marzano. 537 F. 2d 257, 265 (7th. Cir. 1976), cert. denied, 429 U.S. 1038 (1977). Further, the question was not unduly prejudicial within the meaning of 28 U.S.C. Rule 403.

IV

Appellants also contend that the illness of a juror, R. C. Lee, which necessitated a delay in jury deliberations, ultimately had the effect of coercing the jury into rendering a verdict. Appellants argue that the jury verdict was reached in an effort to spare the ill juror more discomfort arising from his confinement with a sequestered jury. Cf. United States v. Pleva, 66 F. 2d 529, 533 (2nd Cir. 1933). In our opinion the circumstances surrounding the sick juror here were

considerably less severe than those involved in United States v. Hall, 536 F 2d 313, 321-324 (10th Cir. 1976) cert. denied, 429 U.S. 919 (1976), where a motion for mistrial was denied. We find that the circumstances surrounding the illness of juror Lee in this case resulted in no prejudice to appellants and that the motion for mistrial was properly denied.

V.

Nor do we find error in the District Court's refusal to allow the prosecutor to be called as a witness in connection with an alleged agreement not to prosecute certain other persons involved in the case. There is no evidence in the record that such an agreement had been made, and in any event, a decision whether or not to prosecute is a matter properly within the discretion of the prosecutor. See United States v. Falk,

479 F. 2d 616, 620 (7th. Cir. 1973). It was also not improper for the court to allow the jury to hear testimony about statements made by real estate salesmen which were attributed to appellant Beck because there was sufficient evidence to support a finding that Beck authorized or ratified those statements. Cf. Pritchard v. United States, 386 F. 2d 760, 766-767 (8th. Cir. 1967), cert. denied sub nom., Borchelt v. United States, 390 U.s. 1004 (1967). Additionally, we are of the view that the District Court properly instructed the jury and did not err in refusing to give certain instructions proffered by appellants. United States v. Zarattini, 552 F. 2d 753 (7th. Cir. 1977), cert. denied, 431 U.S. 942 (1977); Stewart v. United States, 418 F. 2d 1110, 1114 (D.C. Cir. 1969); United States v. Kirk, 534 F. 2d 1262, 1280 (8th. Cir. 1976), cert. denied sub nom., Green v. United States,

430 U.S. 906 (1977).

Affirmed.

APPENDIX B

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

February 8, 1980.

Before

Hon. ROBERT A. SPRECHER, Circuit Judge

Hon. FRANCIS L. VAN DUSEN, Senior Circuit Judge*

Hon. RICHARD D. CUDAHY, Circuit Judge

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

No. 78-2513 vs.

LOUIS BECK and DIVERSIFIED REALTY INVESTMENT CORPORATION,
Defendants-Appellants.

Appeal from the United States District Court for the Eastern District of Wisconsin

78-Cr-19
Robert W. Warren, Judge.

O R D E R

On consideration of the petition for rehearing and suggestion for rehearing in banc filed in the above-entitled cause by defendants-appellants, no judge in active service has requested a vote thereon, and all of the judges on the original panel have voted to deny a rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

* The Honorable Francis L. Van Dusen, Senior Circuit Judge of the United States Court of Appeals for the Third Circuit, sitting by designation.

FPI—MAR—12-12-78-120-1191

APPENDIX C

Supreme Court of the United States

No. A-781

LOUIS BECK, ET AL.,
Petitioners,

v.

UNITED STATES

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for petitioner(s),

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including April 9, 1980.

/s/ John Paul Stevens
Associate Justice of the Supreme Court of the United States

Dated this 11
day of March, 1980.